A

Pan Choon Weng v Mexvin Chow Yew Hoong & Ors

B

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO AA-24NCC-18–11 OF 2021
SU TIANG JOO JC
29 SEPTEMBER 2022

C

Companies and Corporations — Oppression — Oppression of minority — Company in which plaintiff was minority shareholder did not firstly offer new shares to plaintiff before offering to first defendant — Whether allotment of new shares was in breach of s 85 of Companies Act 2016 as well as reg 41 of Table A of Fourth Schedule of Memorandum of Association — Companies Act 2016 ss 85

D

The plaintiff was a minority shareholder of the ninth defendant ('D9'), Urbax Sdn Bhd ('the company'). The company, formerly known as Urbax Fitness Centre Sdn Bhd, was incorporated on 18 August 2016 as a private limited company in Malaysia and its business was mainly in setting up and operating fitness centres. It was founded and incorporated by the first defendant ('D1') together with the assistance of both the second and third defendants ('D2' and 'D3'). D1 to D3 were the original directors and continue to be so. The shareholding in the company was 34% held by D1, 33% by D2 and the balance 33% by D3. As its business grew, in 2019, other shareholders in the form of the plaintiff, the fifth to eighth defendants ('D5 to D8') were invited to join the company. To regulate their relationship and to clearly define their rights and privileges, a shareholders' agreement was executed ('the shareholders' agreement') between all of the eight shareholders comprising D1 to D3, D5 to D8 and the plaintiff. The total shareholding of company upon the entry of D5 to D8 and the plaintiff in 2019 was 700,000 shares and split in the following manner: 30% by D1, 23% by D2, 15% by D3, 15% by the plaintiff, 6% by D5, 5% by D6, 3% by D7 and 3% by D8. On 29 January 2021, D1 transferred all his shares in the company to Urbax Capital Sdn Bhd ('D4') of which he was the sole shareholder and director. This was with the agreement of all the then eight shareholders including the plaintiff. A supplementary agreement to the shareholders agreement was entered into to reflect this. An annual general meeting of the company ('the AGM') was held duly attended by all the nine shareholders namely the plaintiff and D2 to D8 with D4 being represented by D1. At the AGM, D2 on behalf of the board of directors of the company comprising D1 to D3, proposed a rights issue of new units of ordinary shares ('the new shares') to be allotted to D1 as the managing director on the grounds, inter alia, that the company ought to reward D1 for his efforts, contributions, leadership and guidance as a director for the past three years. The plaintiff opposed the proposal but it was passed by all the other shareholders carrying

E

F

G

H

I

85% votes. The net effect was that the plaintiff's shareholding had been halved to 7.5%. The plaintiff was aggrieved and called upon the defendants to buy out his entire shareholding at market value and receiving no response commenced this action. He claimed oppression of a minority shareholder and sued for his shares to be bought out at a fair value to be valued and damages or equitable compensation. To support his oppression claim, the plaintiff put forward the following grounds, inter alia, that: (a) the protective provisions on a shareholder's pre-emptive rights for the allotment of new shares contained in s 85 of the Companies Act 2016 ('the Act') as well as reg 41 of Table A of the Fourth Schedule of Memorandum of Association ('reg 41') had been breached and violated in that the new shares were not firstly offered to him as an existing shareholder before it was offered to D1; (b) D1 to D8's reliance on a term in the shareholders agreement to assert that there was no breach of his pre-emptive rights purportedly because he had waived his rights to the same was untenable because such a term was in direct contradiction with reg 41; and (c) in the event of any contradiction and/or inconsistency between the constitution of the company housed within the articles and memorandum of association of the company and the shareholders' agreement, the constitution would prevail. D1 to D8 relied on the following three main grounds to oppose the plaintiff's claim: (i) that there was no question of pre-emption rights as the new shares were allotted to D1 as a promoter of the company, with reliance placed on the provisions of s 75 of the Act; (ii) that in any event, pursuant to the shareholders agreement, the shareholders including the plaintiff had waived their pre-emption rights under s 85 of the Act in the allotment of new shares; and (iii) there was no oppression against the plaintiff.

Held, dismissing the claim:

(1) Contrary to the plaintiff's assertion that D1 to D8 in opposing his claim had not pleaded that there was 'direction to the contrary', they in fact had done so. The averments contained in the exchange of affidavits were sufficient for the defendants to mount the legal challenge on a point of law whether the provisions of s 85 of the Act and reg 41 applied in the circumstances of the case. Therefore, the pleading point asserted by the plaintiff was devoid of merit (see paras 74–76).

(2) Applying the harmonious rule of construction, ss 85 and 75(2)(c) of the Act ought to be construed so as to complement each other and were to be applied depending on the circumstances of each case, failing which the statutory exception conferred by s 75(2)(c) of the Act would be denuded of any efficacy, and this would offend the rule that statutory language could not be treated as mere surplusage (see para 81).

(3) Save for asserting that his agreement to waive his pre-emptive rights was contrary to s 85 of the Act and reg 41, the plaintiff had not shown that it would be contrary to public policy to allow such an agreement. Instead,

the shareholders' agreement merely sought to regulate the private interests of shareholders in a private company limited by shares which was incorporated and operated with the view to seeking profits on a commercial basis for themselves, the shareholders. Therefore, the plaintiff by entering into the shareholders' agreement, and in particular agreeing to the provisions of cl 3 thereof, had waived his rights to be first offered the allotment of the new shares and this agreement was valid and enforceable. The parties to the shareholders' agreement could and in fact had waived, the operation of s 85 of the Act and reg 41 (see paras 87–88 & 90–91).

(4) From the unchallenged averments on the contributions of D1, that the dilution of shareholding was across the board for all the other shareholders, and with a proposal having been made to the plaintiff to maintain his percentage of shareholding despite the allotment of new shares but which he declined, there was no commercial unfairness or oppression practised upon the plaintiff in allotting the new shares to D1 (see para 95).

(5) The plaintiff's assertion that the company's articles took precedence over the shareholders' agreement since the company was not a party to it and the terms never incorporated into the articles was without merit. The issue was not privity or the incorporation of agreed terms by the shareholders into the articles but rather the issue was whether the plaintiff had waived his pre-emption rights. Further, the terms of the shareholders' agreement amounted to a resolution of the company based on the *Duomatic* principle. The shareholders' agreement was freely entered and executed by all the directors of the company as well as the entire body of the shareholders of the company at that time namely all the parties in this action including the plaintiff save for D4 and D9. Applying the *Duomatic* principle, the terms in the shareholders' agreement were binding on the company and was deemed to have been passed in a resolution of the company (see paras 96–97 & 99–100).

(6) The relationship amongst the shareholders had deteriorated not least with the plaintiff's two attempts to be appointed to the board of directors being unsuccessful leading to his discontent. The parties to the shareholders' agreement which was exhibited by D1 and not the plaintiff, ought to be held to the bargain they had made. It was not for the court to rewrite any contract the parties had made (see paras 101–103).

[Bahasa Malaysia summary

Plaintif adalah pemegang saham minoriti defendan kesembilan ('D9'), Urbax Sdn Bhd ('syarikat'). Syarikat itu, yang dahulunya dikenali sebagai Urbax Fitness Centre Sdn Bhd, telah diperbadankan pada 18 Ogos 2016 sebagai sebuah syarikat sendirian berhad di Malaysia dan perniagaan utamanya adalah

menubuhkan dan mengendalikan pusat kecergasan. Ia diasaskan dan diperbadankan oleh defendan pertama ('D1') bersama-sama dengan bantuan kedua-dua defendan kedua dan ketiga ('D2' dan 'D3'). D1 hingga D3 adalah pengarah asal dan berterusan begitu. Pegangan saham dalam syarikat ialah 34% dipegang oleh D1, 33% oleh D2 dan baki 33% oleh D3. Apabila perniagaannya berkembang, pada 2019, pemegang saham lain dalam bentuk plaintif, defendan kelima hingga kelapan ('D5 hingga D8') telah dijemput untuk menyertai syarikat itu. Untuk mengawal selia perhubungan mereka dan untuk menentukan dengan jelas hak dan keistimewaan mereka, perjanjian pemegang saham telah dilaksanakan ('perjanjian pemegang saham') antara kesemua lapan pemegang saham yang terdiri daripada D1 hingga D3, D5 hingga D8 dan plaintif. Jumlah pegangan saham syarikat apabila kemasukan D5 hingga D8 dan plaintif pada tahun 2019 ialah 700,000 saham dan dipecah mengikut cara berikut: 30% oleh D1, 23% oleh D2, 15% oleh D3, 15% oleh plaintif, 6% oleh D5, 5% oleh D6, 3% oleh D7 dan 3% oleh D8. Pada 29 Januari 2021, D1 memindahkan semua sahamnya dalam syarikat itu kepada Urbax Capital Sdn Bhd ('D4') di mana beliau merupakan pemegang saham dan pengarah tunggal. Ini adalah dengan persetujuan kesemua lapan pemegang saham ketika itu termasuk plaintif. Perjanjian tambahan kepada perjanjian pemegang saham telah dimeterai untuk mencerminkan perkara ini. Satu mesyuarat agung tahunan syarikat ('AGM') telah diadakan dengan sewajarnya oleh kesemua sembilan pemegang saham iaitu plaintif dan D2 hingga D8 dengan D4 diwakili oleh D1. Di AGM, D2 bagi pihak lembaga pengarah syarikat yang terdiri daripada D1 hingga D3, mencadangkan terbitan hak unit baharu saham biasa ('saham baharu') untuk diperuntukkan kepada D1 sebagai pengarah urusan atas alasan antara lain bahawa syarikat sepatutnya memberi ganjaran kepada D1 atas usaha, sumbangan, kepimpinan dan bimbingan beliau sebagai pengarah selama tiga tahun yang lalu. Plaintif menentang cadangan itu tetapi ia telah diluluskan oleh semua pemegang saham lain yang mempunyai 85% undi. Kesan bersihnya ialah pegangan saham plaintif telah dikurangkan separuh kepada 7.5%. Plaintif terkilan dan menyeru defendan untuk membeli keseluruhan pegangan sahamnya pada nilai pasaran dan tidak menerima sebarang maklum balas memulakan tindakan ini. Dia mendakwa penindasan terhadap pemegang saham minoriti dan menyaman untuk sahamnya dibeli pada nilai saksama untuk dinilai dan ganti rugi atau pampasan saksama. Untuk menyokong tuntutan penindasannya, plaintif mengemukakan alasan berikut, antara lain, bahawa: (a) peruntukan perlindungan ke atas hak pendahuluan pemegang saham untuk peruntukan saham baharu yang terkandung dalam s 85 Akta Syarikat 2016 ('Akta') serta peraturan 41 Meja A Jadual Keempat Memorandum Persatuan ('peraturan 41') telah dilanggar kerana saham baharu itu tidak ditawarkan kepadanya sebagai pemegang saham sedia ada sebelum ia ditawarkan kepada D1; (b) pergantungan D1 hingga D8 pada terma dalam perjanjian pemegang saham untuk menegaskan bahawa tiada pelanggaran hak pendahuluannya kononnya kerana dia telah mengetepikan haknya terhadap perkara yang sama

adalah tidak boleh dipertahankan kerana istilah sedemikian adalah bercanggah langsung dengan peraturan 41; dan (c) sekiranya berlaku apa-apa percanggahan dan/atau penyangkalan antara perlembagaan syarikat yang terkandung dalam artikel dan memorandum persatuan syarikat dan perjanjian pemegang saham, perlembagaan akan diguna pakai. D1 hingga D8 bergantung pada tiga alasan utama berikut untuk menentang tuntutan plaintif: (i) bahawa tidak ada persoalan mengenai hak pendahuluan kerana saham baharu telah diperuntukkan kepada D1 sebagai penganjur syarikat, dengan pergantungan diletakkan pada peruntukan s 75 Akta; (ii) bahawa dalam apa jua keadaan, menurut perjanjian pemegang saham, pemegang saham termasuk plaintif telah mengetepikan hak pendahuluan mereka di bawah s 85 Akta dalam peruntukan saham baharu; dan (iii) tiada penindasan terhadap plaintif.

Diputuskan, menolak tuntutan:

(1) Bertentangan dengan penegasan plaintif bahawa D1 hingga D8 dalam menentang tuntutannya tidak memplid bahawa terdapat 'arahan sebaliknya', mereka sebenarnya telah berbuat demikian. Penegasan yang terkandung dalam pertukaran afidavit adalah mencukupi bagi defendan untuk melancarkan cabaran undang-undang pada titik undang-undang sama ada peruntukan s 85 Akta dan peraturan 41 terpakai dalam keadaan kes itu. Oleh itu, perkara pliding yang ditegaskan oleh plaintif adalah tidak mempunyai merit (lihat perenggan 74–76).

(2) Menggunakan peraturan tafsiran harmoni, ss 85 dan 75(2)(c) Akta sepatutnya ditafsirkan supaya saling melengkapi dan akan digunakan bergantung pada keadaan setiap kes, jika gagal pengecualian yang diberikan oleh s 75(2)(c) Akta akan dinafikan daripada sebarang keberkesanan, dan ini akan menyalahi peraturan bahawa bahasa berkanun tidak boleh dianggap sebagai tidak penting (lihat perenggan 81).

(3) Kecuali menegaskan bahawa persetujuannya untuk mengetepikan hak pendahuluannya adalah bertentangan dengan s 85 Akta dan peraturan 41, plaintif tidak menunjukkan bahawa ia akan bertentangan dengan dasar awam untuk membenarkan perjanjian sedemikian. Sebaliknya, perjanjian pemegang saham hanya bertujuan untuk mengawal selia kepentingan persendirian pemegang saham dalam syarikat persendirian terhad oleh saham yang diperbadankan dan dikendalikan dengan tujuan untuk mencari keuntungan secara komersial untuk diri mereka sendiri, para pemegang saham. Oleh itu, plaintif dengan menandatangani perjanjian pemegang saham, dan khususnya bersetuju dengan peruntukan klausa 3 daripadanya, telah mengetepikan haknya untuk ditawarkan terlebih dahulu peruntukan saham baharu dan perjanjian ini adalah sah dan boleh dikuatkuasakan. Pihak-pihak dalam perjanjian

pemegang saham boleh dan sebenarnya telah mengetepikan, penggunaan s 85 Akta dan peraturan 41 (lihat perenggan 87–88 & 90–91).

(4) Daripada penegasan yang tidak dicabar mengenai caruman D1, bahawa pencairan pegangan saham adalah terhadap seluruh lembaga untuk semua pemegang saham yang lain, dan dengan cadangan telah dibuat kepada plaintif untuk mengekalkan peratusan pegangan sahamnya walaupun terdapat peruntukan saham baharu tetapi ditolaknya, tiada ketidakadilan komersial atau penindasan yang diamalkan ke atas plaintif dalam memperuntukkan saham baharu kepada D1 (lihat perenggan 95).

(5) Penegasan plaintif bahawa artikel syarikat lebih diutamakan daripada perjanjian pemegang saham kerana syarikat itu bukan pihak kepadanya dan terma yang tidak pernah dimasukkan ke dalam artikel adalah tanpa merit. Isunya bukan priviti atau penggabungan terma yang dipersetujui oleh pemegang saham ke dalam artikel tetapi isunya ialah sama ada plaintif telah mengetepikan hak pendahuluan beliau. Selanjutnya, syarat perjanjian pemegang saham berjumlah resolusi syarikat berdasarkan prinsip *Duomatic*. Perjanjian pemegang saham telah dimeterai dan dilaksanakan secara bebas oleh semua pengarah syarikat serta seluruh badan pemegang saham syarikat pada masa itu iaitu semua pihak dalam tindakan ini termasuk plaintif kecuali D4 dan D9. Menggunakan prinsip *Duomatic*, terma dalam perjanjian pemegang saham adalah mengikat syarikat dan dianggap telah diluluskan dalam resolusi syarikat (lihat perenggan 96–97 & 99–100).

(6) Hubungan antara pemegang saham telah merosot sekurang-kurangnya dengan dua percubaan plaintif untuk dilantik ke lembaga pengarah tidak berjaya yang membawa kepada ketidakpuasan hatinya. Pihak-pihak kepada perjanjian pemegang saham yang dikemukakan oleh D1 dan bukan plaintif, harus dipegang dengan tawar-menawar yang telah mereka buat. Ia bukan hak mahkamah untuk menulis semula mana-mana kontrak yang telah dibuat oleh pihak-pihak (lihat perenggan 101–103).]

Cases referred to

A company, Re [1986] BCLC 362, Ch D (refd)

Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors [2021] 3 MLJ 549, FC (refd)

Beh Chun Chuan v Paloh Medical Centre Sdn Bhd [1999] 3 MLJ 262, HC (refd)

Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors [2022] 2 MLJ 857; [2021] 9 CLJ 849; [2022] 2 MLRA 553, CA (distd)

Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors [2020] 11 MLJ 120; [2020] 6 CLJ 684, HC (refd)

Danaharta Hartanah Sdn Bhd v KSL Reality Sdn Bhd & Benua Kurnia Sdn Bhd & Neraca Prisma Sdn Bhd (Pencelah) [2008] MLJU 460, CA (folld)
Duomatic Ltd, Re [1969] 2 Ch 365, Ch D (folld)
Emma Silver Mining Co v Lewis & Son (1879) 4 CPD 396, HC (refd)
Erlanger v New Sombrero Phosphate Co (1878) 3 App Cas 1218, HL (refd)
Euro Brokers Holding Ltd v Monecor (London Ltd) [2003] 1 BCLC 506, CA (refd)
Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35; [1985] CLJ Rep 122, SC (refd)
HR Harmer Ltd, Re [1958] 3 All ER 689, CA (refd)
ISM Sdn Bhd v Queensway Nominees (Asing) Sdn Bhd & Ors and other suits [2021] 7 MLJ 506, HC (refd)
Jermyn Street Turkish Baths Ltd, Re [1971] 3 All ER 184, CA (refd)
Jimat bin Awang & Ors v Lai Wee Ngen [1995] 3 SLR 769, CA (refd)
Koh Jul Hiong @ Koa Jul Heong v Ki Tak Sang @ Kee Tak Sang [2014] 3 WILJ 10 (refd)
Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227, PC (refd)
Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application [1994] 2 MLJ 789, HC (refd)
Legal Costs Negotiators Ltd, Re [1999] 2 BCLC 171, Ch D (refd)
Liew Teck Fook v Chan Yip Pooi [2005] 5 CLJ 20, HC (refd)
London School of Electronics Ltd, Re [1985] BCLC 273, Ch D (refd)
Mega Education Systems Sdn Bhd & Anor v Ozone Glass Design Sdn Bhd & Ors [2011] 6 MLJ 644, HC (refd)
Ng Joo Soon (alias Nga Ju Soon) v Dovechem Holdings Pte Ltd and another suit [2011] 1 SLR 1155, HC (refd)
O'Neill and another v Phillips and others, Re a company (No 00709 of 1992) [1999] 2 BCLC 1, HL (refd)
Saul D Harrison & Sons Plc, Re [1995] 1 BCLC 14, CA (refd)
Seah Eng Toh Daniel & Anor v Kingsley Khoo Hoi Leng & 3 Ors [2015] MLJU 2353; [2016] 2 CLJ 695, HC (refd)
Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433; [1987] CLJ Rep 24, PC (refd)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721, FC (refd)
Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors [1996] 2 MLJ 265, CA (refd)
Torvale Group Ltd, Re [1999] 2 BCLC 605, Ch D (refd)
Toshiba Elevator and Building Systems Corporation v Interplex Sdn Bhd & & 4 Ors [2021] MLJU 362; [2021] 1 LNS 430, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 4, Fourth Schedule
Companies Act 2016 ss 2, 75, 75(1), (2), (2)(c), (2)(d), 85, 85(1), 223, 346, 346(1), (2)
Pengurusan Danaharta Nasional Berhad Act 1998 s 72

Chuar Kia Lin (with Lew Wei Shing) (Pierre Chuah & Assoc) for the plaintiff.
Owee Chia Ming (with Shermaljit Singh) (Owee & Co) for the first, second and third defendants
Munira Hasnim (KS SU & Mah) for the fourth, fifth, sixth, seventh and eighth defendants

Su Tiang Joo JC:

INTRODUCTION

[1] The plaintiff is a [minority] shareholder of the ninth defendant, Urbax Sdn Bhd ('the company or D9'). The allotment of new shares in the company on 24 October 2021, was not first offered to him in proportion to his shareholding. Arising from this allotment, his shareholding in the company was diluted from 15% to 7.5%. He claimed oppression of a minority shareholder, and sued for his shares to be bought out at a fair value to be valued and damages or equitable compensation. In the alternative, he prayed for the company to be wound up.

[2] On 26 July 2022, this court dismissed his claim and the following are the grounds for the decision made.

BACKGROUND FACTS

[3] The company, formerly known as Urbax Fitness Centre Sdn Bhd, was incorporated on 18 August 2016 as a private limited company in Malaysia and its business is mainly in setting up and operating fitness centres

[4] It was founded and incorporated by the first defendant ('D1') together with the assistance of both the second ('D2') and third ('D3') defendants D1 to D3 were the original directors and continue to be so.

[5] D1 provided the initial capital of RM150,000 between August to September 2016 but allocated shares to D2 and D3 without the latter two having to pay for them with D1 holding 34%, D2 33% and D3 33% equity in the company.

[6] As its business grew, D1 injected another RM100,000 into the company in October 2017 and again shares were allotted to D2 and D3.

[7] Up to the injection of RM250,000 by D1, the shareholding in the company was 34% held by D1, 33% by D2 and the balance 33% by D3.

[8] As its business grew, in 2019, other shareholders in the form of the plaintiff, the fifth to the eighth ('D5 to D8') were invited to join the company.

[9] To regulate their relationship and to clearly define their rights and privileges, a shareholders' agreement was executed and dated 1 March 2019 (the 'shareholders' agreement') between all of the eight shareholders comprising D1 to D3, D5 to D8 and the plaintiff.

[10] The court observed that the shareholders' agreement was not exhed by the plaintiff in his primary affidavit in support (encl 2) but instead it was produced by D1 in his affidavit in reply (encl 5 exh D10).

[11] The total shareholding of company upon the entry of D5 to D8 and the plaintiff in 2019 was 700,000 shares and split in the following manner:

Shareholder	Shares	% Of Total Shares
D1	210,000	30
D2	161,000	23
D3	105,000	15
Plaintiff	105,000	15
D5	42,000	6
D6	35,000	5
D7	21,000	3
D8	21,000	3
	700,000	100

[12] On 29 January 2021, D1 transferred all his 210,000 shares in the company to Urbax Capital Sdn Bhd ('D4') of which he was the sole shareholder and director. This was with the agreement of all the then [eight] shareholders including the plaintiff (encl 5 para 36). A supplementary agreement to the shareholders agreement was entered into to reflect this (encl 5 exh D12).

[13] An annual general meeting of the company was held virtually via the online Zoom platform on 23 May 2021 ('the 2021 AGM') duly attended by all the nine shareholders namely the plaintiff and D2 to D8 with D4 being represented by D1.

[14] At the 2021 AGM, D2 on behalf of the Board of Directors of the company comprising D1 to D3, proposed a rights issue of 700,000 new units of ordinary shares at RM0.01 (1 sen) per share ('new shares') to be allotted to D1 as the managing director on the grounds, inter alia, that the company ought to reward D1 for his efforts, contributions, leadership and guidance as a director for the past three years ('resolution for rights issue of new shares').

[15] The plaintiff opposed the proposal but it was passed by all the other shareholders carrying 85% votes

[16] Acting in accordance with the resolution for rights issue of new shares, the new shares were duly allotted to D1 on 24 October 2021 with the resultant shareholding in the company being as follows:

Shareholder	Shares	% Of Total Shares
D1	700,000	50
D4	476,000	34
Plaintiff	105,000	7.5
D5	42,000	3
D6	35,000	2.5
D7	21,000	1.5
D8	21,000	1.5
	1,400,000	100

[17] The net effect is that the plaintiff's shareholding has been halved to 7.5%. The plaintiff was aggrieved and called upon the defendants to buy out his entire shareholding at market value and receiving no response commenced this action.

THE PLAINTIFF'S ASSERTIONS

[18] The plaintiff's put forward the following five principal grounds to support his oppression claim:

(a) that the protective provisions on a shareholder's pre-emptive rights for the allotment of new shares contained in s 85 of the Companies Act 2016 as well as reg 41 of Table A of the Fourth Schedule of Memorandum of Association have been breached and violated in that the new shares were not firstly offered to him as an existing shareholder before it was offered to D1;

(b) that such a failure resulted in him having been denied the right to maintain his relative shareholding, voting and distribution rights in the company;

(c) the failure further resulted in his shareholding in the company having been consequentially diluted from 15% to 7.5%;

(d) that D1 to D8's reliance on a term in the shareholders agreement to assert that there was no breach of his pre-emptive rights purportedly because he had waived his rights to the same was untenable because such a term is in direct contradiction with *Regulation 41 of Table A of the Fourth Schedule of Memorandum of Association;* and

(e) that in the event of any contradiction and/or inconsistency between the constitution of the company housed within the Articles and Memorandum of Association of the company and the shareholders' agreement, the constitution would prevail.

[19] On the premise that his claim grounded on oppression had been made out, the plaintiff sought relief under s 346(1) of the Companies Act 2016 which provides as follows:

> 346. Remedy in cases of an oppression
>
> (1) *Any member* or debenture holder *of a company may apply to the court for an order under this section on the ground —*
>
> (a) *That the affairs of the company are being conducted or the powers of directors are being exercised in a manner oppressive to one or more of the members* or debenture holders including himself or *in disregard of his or their interests as members, shareholders* or debenture holders *of the company*; or
>
> (b) *That some act of the company has been done* or is threatened *or that some resolution of the members*, debenture holders or any class of them *has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members* or debenture holders, *including himself.*

THE DEFENDANTS' ASSERTIONS

[20] The nine defendants comprise D1 to D8 and D9, the company.

[21] The company is a nominal party and played no part in the litigation between the plaintiff and its shareholders, D1 to D8.

[22] Amongst D1 to D8, D1 to D3 are represented by one set of solicitors, M/s Owee & Co whereas D4 to D8 were represented by another set of solicitors, M/s KS Su & Mah.

[23] Nevertheless, a careful perusal of the written submissions filed by D1 to D3 (encls 16 and 25) and that by D4 to D8 (encls 21 and 27) reveal that they are on common grounds in resisting the plaintiff's action, and during the

presentation of oral submissions on 4 July 2022, the learned counsel for D4 to D8 was content to adopt the submissions of the learned counsel for D1 to D3.

[24] In the circumstances, the submissions presented by D1 to D8 were considered collectively, and when taken together, it can be seen that they rely on the following three main grounds to oppose the plaintiff's claim:

(a) that there was no question of pre-emption rights as the new shares were allotted to D1 as a promoter of the company, with reliance placed on the provisions of s 75 of the Companies Act 2016;

(b) that in any event, pursuant to the shareholders agreement, the shareholders including the plaintiff had waived their pre-emption rights under s 85 of the Companies Act 2016 in the allotment of new shares; and

(c) in the circumstances of this case there was no oppression against the plaintiff.

LAW ON OPPRESSION

[25] Learned counsel for the plaintiff made reference to the legal principles on the law of oppression provided by s 346 of the Companies Act 2016 (formerly housed in s 181 of the Companies Act 1965) and discussed recently in the High Court case of *Toshiba Elevator and Building Systems Corporation v Interplex Sdn Bhd & & 4 Ors* [2021] MLJU 362; [2021] 1 LNS 430 (HC) where reliance was in turn placed upon the landmark decision of the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 and where the High Court held as follows:

> [30] In the landmark case of *Re Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 the Privy Council at p 229 held as follows:
>
> > As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v Elder & Watson Ltd*): their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set it at naught the proper company procedure (per Lord Clyde in *Thompson v Drysdale*). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.
>
> [31] In the case of *Pan-Pacific Construction Holdings Sdn Bhd v Ngiu-Kee Corporation (M) Bhd & Anor* [2010] MLJU 269; [2010] 6 CLJ 721, at pp 734–

736 the Federal court made reference to s 181 of Companies Act 1965 and stressed on the basic theme of 'unfairness' in the same:

> [25] Therefore, in order to succeed in its petition pursuant to s 181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.
>
> [26] In other words s 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.
>
> [27] It may also be noted that from the wordings of 181 its basic theme is 'unfairness'. However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles 'The court ... has a very wide discretion, but it does no sit under a palm tree' (see *O'Neil v Philips* [1999] 2 All ER 961).
>
> [29] Thus, in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227; [1978] 1 LNS 170 the term 'disregard of interests' is to be understood to mean 'unfair disregard while 'oppression denotes an 'unfairly prejudicial conduct' which means a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. But 'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted'. And 'trivial or technical infringements of the articles were not Intended to give rise to petitions under s 459 (see *Re Saul D Harrison & Sons Plc.*

[32] A single act or omission can constitute unfairness, so long as the effect of the same persists at the date of this Os In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113 at p 129 Gopal Sri Ram JCA (as he then was) held:

> para (a) to the first subsection of 181 is not, as observed by Lord Wilberforce, directed at specific or particular acts or omissions It is directed at the nature of the conduct complained of.
>
> And where attention is called to particular acts or omissions, it is the effect of these which has to be considered. It is not and has never been the law that the section does not bite where what is complained of is but a single act or omission on the part of the wrongdoer.
>
> A single act or omission may, by its very nature, have so devastating or far-reaching a consequence upon the rights of a member that its effects may be permanently felt for the purposes of 181(1)(a), it is sufficient that the effects of a single act or omission are such that they persist at the date of the presentation of the petition. It is no answer, in those circumstances, for the perpetrators of the

act or omission to allege that there was no continuous oppressive conduct up to the date of presentation of the petition.

[26] The High Court in *Toshiba* went on to helpfully digest and marshal the further principles on the law on oppression as follows:

(a) the power under s 346(2) of the CA is wide and a serious inroad into the doctrine of freedom of contract which is one of the pillars of commercial law. Such power must only be exercised in proper cases (see *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 2 MLJ 789 at p 802);

(b) before the court grants relief under s 346(2) of the CA, the court must be satisfied that there are grounds proven under s 346(1) of the CA;

(c) burden of proof is on the plaintiff. He must identify the complaint and prove 'oppression' or 'disregard of interest' (see *Re Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* at p 229);

(d) there must be presence of 'overbearing act' on the part of the oppressor (see in *Re Jermyn Street Turkish Baths Ltd* [1971] 3 All ER 184 at p 199; *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors and another application* at p 805);

(e) the section cannot be invoked for policy or executive decisions (see *Re Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* at p 229; in *Re Saul D Harrison & Sons Plc* [1995] 1 BCLC 14 at p 30);

(f) the provision is enacted to protect the helpless minority. Hence, when the complainant had taken steps to remedy the complaint, or had taken control of the company affording them power to remedy the complaint, no relief should be granted (see *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171 at p 182);

(g) the act of oppression must be an act in the defendant's capacity as shareholder or director of the company. Acts or omissions in any other capacity is not remediable under s 346(2) of the Companies Act 2016 ('the CA') (see *Re Legal Costs Negotiators Ltd* at p 180);

(h) the prejudice suffered by the applicant must: (i) exist; (ii) in relation to his status as member or shareholder, but not other capacity. (see in *Re Saul D Harrison & Sons Plc* at p 30; *Re HR Harmer Ltd* [1958] 3 All ER 689). Loss to the company that is recoverable by the company would not be entertained (see *Koh Jul Hiong @ Koa Jul Heong v Ki Tak Sang @ Kee Tak Sang* [2014] 3 WILJ 10 at p 23);

(i) in deciding whether an act is 'oppressive' or 'unfair', the parties' relationship, including any agreement between them is relevant. See:

Pan-Pacific Construction Holding v Ngiu-Kee Corporation (M) Bhd & Anor at p 735;

(j) s 346(2) of the CA uses the word 'may'. Hence, even if a case of 'oppression' or 'unfairness' is made out, the court still have discretion to refuse remedy in appropriate case;

(k) delay is a factor for [the] court to refuse remedy (see *Re a company* [1986] BCLC 362 at p 366);

(l) the conduct of an applicant which contributes to the act of the respondent is to be considered (see *Re London School of Electronics Ltd* [1985] BCLC 273 at p 279); and

(m) if the disputed facts are credibly denied, the court must proceed to decide the case on undisputed facts and determine the issue (see *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 at p 436; [1987] CLJ Rep 24 at p 28).

CORE ISSUE

[27] The five principal grounds relied upon by the plaintiff can be distilled into one core issue, namely, whether the allotment of the new shares was in the circumstances of this case, in breach of s 85 of the Companies Act 2016 as well as *Regulation 41 of Table A of the Fourth Schedule of Memorandum of Association* and if so, what was the appropriate relief to be given to the plaintiff.

Section 85 and reg 41 of Table A of the Fourth Schedule of Memorandum of Association

[28] The provisions of s 85 of the Companies Act 2016 ('s 85 of the CA 2016') is reproduced hereunder:

85 Pre-emptive rights to new shares

(1) *Subject to the constitution*, where a company issues shares which rank equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders

(2) An offer under subsection (1) shall be made to the holders of existing shares in a notice specifying the number of shares offered and the time frame of the offer within which the offer, if not accepted, is deemed to be declined.

(3) If the offer is not accepted after the expiry of the period specified in the notice under subsection (2), the directors may dispose those shares in such manner as the directors think most beneficial to the company.

[29] Section 85(1) of the CA 2016 expressly makes it clear that its provisions on the issuance of shares shall be subject to the constitution. The constitution that is meant here is the constitution of a company which is often, if not always, its articles of association.

[30] Wherefore, it follows that we should look at the constitution of the company to see whether there is any regulation that deal with pre-emptive rights to new shares.

[31] As pointed out by learned counsel for the plaintiff, *article 1 of the articles of association of the company* had adopted Table A in the Fourth Schedule of the Companies Act 1965 except for regs 71 and 90 of Table A. This is undisputed by D1 to D8.

[32] *Regulation 41* of Table A in the Fourth Schedule (the 'reg 41') reads as follows:

> 41. *Subject to any direction to the contrary* that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and, after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the share offered, the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this regulation.

[33] There is, therefore, in fact such a regulation governing pre-emptive rights to new shares of the company and in the main, the provisions in reg 41 are similar to that contained in s 85 of the Companies Act 2016 save for some minor differences in the wording which is of no import to the case herein.

THE PLAINTIFF'S FURTHER ASSERTIONS

[34] The plaintiff assert that premised upon the provisions of s 85 of CA 2016 and reg 41, the resolution for rights issue of new shares and the subsequent issuance of the new shares to D1 amounts to a clear breach of s 85 of CA 2016 as well as the constitution of the company and in particular reg 41 due to the failure of the directors of the company comprising D1 to D3, to firstly offer the new shares to the plaintiff as an existing shareholder of the company.

[35] Such failure, according to the plaintiff, is tantamount to a total disregard of the plaintiff's pre-emptive rights to the new shares in the company resulting in the plaintiff's shareholding in the company having been unlawfully and substantially diluted by half from 15% to 7.5%.

[36] Thus, the plaintiff assert there was clear oppression and or prejudicial conduct as against the plaintiff as a minority shareholder in the company.

[37] In support of the plaintiff's assertions, learned counsel for the plaintiff placed heavy reliance on the recent Court of Appeal case of *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2022] 2 MLJ 857; [2021] 9 CLJ 849; [2022] 2 MLRA 553 wherein the Court of Appeal therein was tasked to answer whether the disregard of a minority shareholder's preemptive rights to new shares would amount to oppression under the ambit of s 346 of the CA 2016.

[38] In *Concrete Parade* the facts are:

(a) Concrete Parade Sdn Bhd is a minority shareholder in Apex Equity Holdings Bhd which is a public listed company engaged principally in the business of investment holding and trading in marketable securities JF Apex Sdn Bhd is a wholly-owned subsidiary of Apex Equity Holdings Bhd;

(b) Concrete Parade Sdn Bhd brought an action against the respondents for minority oppression under s 346, CA 1965. Its complaint of oppression stems from two sets of transactions: (i) certain share buy-back transactions that had been conducted by Apex Equity between 2005 and 2017; and (ii) proposed merger exercise between JF Apex and Mercury Securities carried out via the merger agreements comprising (i) the heads of agreement ('HOA') and the business merger agreement ('BMA') and the subscription agreements. The HOA is the heads of agreement dated 21 September 2018 between Apex Equity and Mercury Securities Sdn Bhd, for the merger and transfer of the business of Mercury Securities Sdn Bhd to JF Apex Sdn Bhd via the BMA and the subscription agreements;

(c) both the HOA and BMA were entered into *without obtaining prior shareholder approval*;

(d) under the BMA, Mercury Securities Sdn Bhd was to be paid RM140m in the following manner — (a) a sum of RM92m shall be paid by the issuance of RM100m new ordinary shares of Apex Equity Bhd to Mercury Securities Sdn Bhd at an issue price of RM0.92 per share; and (b) the balance of RM48m shall be paid in cash and partly funded by the proposed private placement of 20,000,000 new ordinary shares of Apex Equity Bhd, which shall generate proceeds in the sum of RM18.8m;

(e) Concrete Parade Sdn Bhd brought a minority oppression action under s 346 of the CA 2016 to: (a) nullify all agreements pertaining to the merger exercise on the ground that they breached ss 85 and 223 of CA 2016 for denying Concrete Parade's statutory pre-emptive right to be offered the new shares in Apex Equity Bhd.;

(f) the High Court dismissed Concrete Parade's oppression action (see *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2020] 11 MLJ 120; [2020] 6 CLJ 684), and in relation to the purported breach of the statutory pre-emptive rights under s 85 of the CA 2016, it held, inter alia, that:

(i) there has not been any contravention of the rights of preemption, due to the fact that the proposed placement had been approved by the shareholders of Apex Equity Bhd as its general meeting held on 20 June 2019; and

(ii) it was not necessary for the circular to the shareholders of Apex Equity to expressly specify that approving the proposed acquisition of Mercury Securities Sdn Bhd's business would amount to a waiver or the shareholders' right of pre-emption, because any reasonably incumbent shareholder would have understood that a private placement must necessarily have the effect of diluting that shareholder's interest in Apex Equity Bhd. Put another way, the failure to use a specific form of words denoting the waiver of a right of pre-emption could not amount to an act of oppression, for as long as the effects of the transaction being proposed were made reasonably clear to the shareholders of Apex Equity;

(g) the Court of Appeal overturned the High Court's decision and Lau Bee Lan JCA speaking for the Court of Appeal held as follows in relation to a breach of pre-emptive rights under s 85 of the CA 2016:

> [20] We are of the considered view that the appellant has a statutory and contractual pre-emptive right to be offered new shares in Apex Equity premised on a reading of:
>
> (i) *s 85(1) of the CA 2016* which provides:
>
> (1) Subject to the constitution, where a company issues shares which rank equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders; with
>
> (ii) Article 11 of the M &A which states:
>
> Subject to any direction to the contrary that may be given by the company in general meeting, all new shares or other convertible securities shall be offered to such persons as at the date of the offer are

> entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled
>
> ... (Emphasis added.)
>
> We further hold that the appellant cannot be denied its pre-emptive right unless there is 'direction to the contrary' given during a general meeting, prior to such new shares being offered to outsiders.

[39] The plaintiff assert that article 11 of the M&A as mentioned in the case of *Concrete Parade* is similarly worded as reg 41 of the company's M&A.

[40] Therefore, the plaintiff go on to assert that to the extent that when reg 41 is read together with s 85 of the CA 2016, the plaintiff cannot be denied his pre-emptive right to be offered the new shares unless there is a 'direction to the contrary, and on the facts of this case, the plaintiff assert there is clearly no direction to the contrary and nowhere have the defendants pleaded the same.

[41] In any event, the plaintiff further asserted that the Court of Appeal in *Concrete Parade* had held in no uncertain terms that even the words 'subject to any direction to the contrary' under s 85 of the CA 2016 does not entitle a full waiver of the existing shareholders' pre-emptive rights In this regard, the plaintiff quoted from the Court of Appeal's decision at para [22] which held as follows:

> [22] The learned judge held the view that 'the resolution passed by the company in general meeting approving the business (which included the proposed placement as part of it) amounted to a 'direction to the contrary that may be given by the company in general meeting' for the purposes and within the meaning of article 11' (para 47 grounds of judgment) and para 18 above. We respectfully disagree with this finding of the learned judge for the reasons below.
>
> [23] The appellant submits that the placement resolution passed at Apex Equity's EGM cannot in law constitute a 'direction to the contrary' because the words 'subject to any direction to the contrary' under s 85 of the CA 2016 does not entitle a full waiver of the shareholders 'pre-emptive rights'. In support thereof the appellant relies on *Shanti Prasad Jain v Kalinga Tubes Ltd and Ors* AIR 1962 Ori 202 wherein the Indian High Court at p 208 held that the equivalent Indian s of s 81 of the Companies Act 1956 'in the allotment of new shares does not contemplate total exclusion of the existing shareholders from participating; the clause 'subject to any directions to the contrary' can only refer to the manner and proportion in which the shares have to be offered to the existing shareholders'. Thus we find there is merit in the submission of the appellant that no resolution passed at a general meeting can completely displace the appellant's preemptive rights in the new shares as was sought to be done via the subscription agreements.

A [24] In any event we agree with the submission of the appellant that-on the facts of the appeal before us, the placement resolution cannot constitute a 'direction to the contrary' for the following reasons:

(i) *a 'direction to the contrary' must be obtained before any shares are offered to outsiders*. However, in the appeal before us, the undisputed fact is that the placement resolution was passed after the execution of subscription agreements where the offer of the placement shares to the seven placees (ninth to 15th respondents). Thus, the placement resolution cannot retrospectively allow the issuance of new shares to outsiders in breach of s 85 of the CA 2016.

(ii) for a *'direction to the contrary'* to be operative, the proposed resolution must set out all the requisite information regarding the shareholders' pre-emptive rights unders 85(1) of the CA 2016 ie:

(a) the existing shareholders had a statutory pre-emptive right to be offered any new shares which rank equally to existing shares issued by Apex Equity read together with *article 11 of the M&A*;

(b) by voting in favour of the resolution for the issuance of the placement shares, the shareholders of Apex Equity would be waiving their statutory pre-emptive right;

(c) the placement resolution cannot be relied upon to suggest a waiver of express statutory rights because a waiver by election is only valid if the party electing had knowledge of his legal rights and with that knowledge consciously chose not to exercise the same. In this regard, we rely on the English Court of Appeal decision in *Peyman v Lanjani* [1985] Ch 457 at p 487 which applied another decision of the court in *Leathley v John Fowler & Co Ltd* [1946] KB 579.

[42] The plaintiff go on to assert that 'a direction to the contrary' was never obtained by the defendants and nowhere, and at no time, had D1-D3 ever mentioned or specified any information with regards to the plaintiff's preemptive rights under s 85 of the CA 2016 as well as reg 41.

[43] Wherefore, the plaintiff assert there is a clear breach of the plaintiff's statutory pre-emptive rights provided under s 85 of the CA 2016 read together with reg 41 when D1-D3, who make up the board of directors of D9, completely disregarded the plaintiff's pre-emptive rights by not firstly offering the new shares to the plaintiff before offering them to D1.

The collective further assertions of D1 to D8

[44] The collective assertions of D1 to D8 are three-fold namely that:

(a) there is no question of pre-emption rights as the new shares were allotted to D1 as a promoter of the company;

(b) the requirements under s 85 of the CA 2016 and the reg 41 if at all required to be met, have been waived and if so whether the waiver is valid; and

(c) the plaintiff's rights as a shareholder of the company was not in any manner oppressed, prejudiced and or unfairly discriminated against as all the other shareholder's shareholding were proportionately diluted and an opportunity was given to the plaintiff to maintain his 15% shareholding which he declined.

D1 is a promoter of the company

[45] Section 75 the CA 2016 provides that shares in a company can only be allotted upon obtaining shareholder approval. However, no approval is needed for certain scenarios including the allotment of shares to a promoter of the company or to a seller of shares/assets which the company intends to purchase. This provision is reproduced hereunder:

75 Exercise of power of directors to allot shares or grant rights

(1) *Unless the prior approval by way of resolution by the company has been obtained, the directors of a company shall not exercise any power —*

(a) *to allot shares in the company*;

(2) Subsection (1) shall not apply to —

(a) an allotment of shares, or grant of rights, under an offer made to the members of the company in proportion to the members' shareholdings;

(b) an allotment of shares, or grant of rights, on a bonus issue of shares to the members of the company in proportion to the members' shareholdings;

(c) *an allotment of shares to a promoter of a company that the promoter has agreed to take;* or

(d) shares which are to be issued as consideration or part consideration for the acquisition of shares or assets by the company and members of the company have been notified of the intention to issue the shares at least fourteen days before the date of issue of the shares.

[46] Section 85 of the CA 2016 provides that any shares issued in a company shall first be offered to existing shareholders in proportion to their respective shareholdings This provision is reproduced hereunder for ease of reading:

85. Pre-emptive rights to new shares

(1) Subject to the constitution, where a company issues shares which rank equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders

[47] Section 85 is a codification of the pre-emption rights under reg 41 of Table A, Companies Act 1965 ('the CA 1965') which the company has adopted as part of its articles. This provision of this regulation is again reproduced hereunder for ease or reading:

Article 41 of Table A;

41. Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled.

[48] In the *Annotated Malaysian Companies Act 2016*, Cheah Foo Seong (2017) (p 115) the learned author states that s 85 is a codification of reg 41.

[49] Learned counsel for the defendants assert that ss 75 and 85 of the CA 2016 complement each other and would lead to the following interpretation when read together holistically:

(a) when an allotment of shares falls under one of the specific scenarios set out under s 75(2), no shareholder approval is required and such shares need not first be offered to existing shareholders; and

(b) for all other types of share allotments, prior shareholder approval is required and such shares must first be offered to existing shareholders.

[50] Reliance for the above assertion is made on an extract from the textbook on *Corporate Powers Accountability*, Low Siew Cheang, 3rd Ed (2018) (p 186) where the learned author opines that ss 75 and 85 complement each other and reliance is placed upon the case of *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721 (FC) pp 734–741 para 28–30 on the rules of statutory interpretation.

[51] Learned counsel for D1 to D3 asserted that any contrary interpretation that all new shares in a company must always be first offered to existing shareholders would lead to an absurd situation because the promoter and seller exceptions under s 75(2)(c) and (d) would be of no effect. This is because if the new shares are all taken up by the existing shareholders pursuant to the offers to them, there would be no shares left to allot to the promoter/seller thereby denuding the provisions housed in s 75(2)(c) and (d) of any effect.

[52] A promoter was defined under s 4 of the CA 1965 only in relation to a prospectus issued by a company and this definition remains unchanged under s 2 of the CA 2016.

[53] For the purposes of s 75(2)(c) of the CA 2016, the definition of a promoter can be taken from the general interpretation given to promoters under common law which are persons who set up a company and/or who run the company in the early stages.

[54] Whether a person is a promoter is a question of fact and a person can become or remain a promoter post-incorporation. In *Tengku Abdullah Ibni Sultan Abu Bakar & Ors v Mohd Latiff bin Shah Mohd & Ors* [1996] 2 MLJ 265 (CA) p 291 e-i it was held that:

> The learned judge, in the passage we have cited, correctly recognized that the question whether the appellants were promoters is one of fact ...
>
> ...
>
> Raja Aziz Addruse of counsel for the respondents supported this conclusion formed by the learned judge ... Counsel then formulated the following definition of the expression 'promoter' which we unhesitatingly accept as helpful and accurate: A promoter is one who starts off a venture — any venture — not solely for himself, but for others, but of whom he may be one.

[55] In *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) pp 1236, 1268 it was held that:

> ... it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation.
>
> ... Throughout the Companies Act, 1862 (25 & 26 Vict c 89), *the word 'promoters' is not anywhere used. It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company.*

[56] In *Emma Silver Mining Co v Lewis & Son* (1879) 4 CPD 396 (UK HC) p 407 it was held that:

> ... As used in connection with companies the term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it) ...

[57] D1 to D3, therefore asserted that there is no breach of any pre-emption rights as D1 is a promoter of the company, and the following facts were deposed in support of this contention:

(a) D1 founded the company and this is expressly admitted by the plaintiff and all the other shareholders, and expressly recognised in cl 3 of the shareholders' agreement;

(b) D1 solely funded the company's initial capital; and

(c) D1 has been running the company's business since its incorporation.

[58] With the new shares having been allotted to D1 who is a promoter of the company, the exception under s 75(2)(c) of the CA 2016 applies. This means that such an allotment did not require shareholder approval at all and did not need to be first offered to the existing shareholders although in this instance, shareholders' approval was obtained twice at the annual general meeting held on 23 May 2021 and the extraordinary general meeting held on 21 October 2021.

[59] As a result, the defendants collectively assert that the plaintiff's preemption right under s 85 of the CA 2016 and the reg 41 was not triggered vis a vis the allotment of the new shares to D1.

[60] As for the plaintiff's reliance on the Court of Appeal authority of *Concrete Parade*, it was pointed out by the defendants that this case is inapplicable to the instant case because:

(a) it was not concerned with the allotment of shares to a promoter of a company or the other exceptions under s 75(2)(c);

(b) it was also not concerned with the waiver by shareholders of their pre-emptive rights prior to the allotment of shares; and

(c) the ratio of *Concrete Parade* was that shareholders' approval for the issuance of the shares in the company had to be obtained prior to the issuance in accordance with s 75(1). The shareholder approval in *Concrete Parade* was only obtained *after* there was an agreement for the issuance of the shares and such approval was invalid.

The requirements of s 85 of the CA 2016 and the reg 41, if at all required to be met, have been waived

[61] The defendants assert that pre-emption rights under s 85 of the CA 2016 and the reg 41 can be waived whether expressly or by conduct. Reliance is placed upon the authority of *Re Torvale Group Ltd* [1999] 2 BCLC 605 (UK HC) p 613 e-h, 617 e-g and *Euro Brokers Holding Ltd v Monecor (London Ltd)* [2003] 1 BCLC 506 (UK CA) p 551–552 para 61–62.

[62] In *Danaharta Hartanah Sdn Bhd v KSL Reality Sdn Bhd & Benua Kurnia*

Sdn Bhd & Neraca Prisma Sdn Bhd (Pencelah) [2008] MLJU 460 (CA) p 22–23 it was held by the Court of Appeal that statutory rights can also be waived.

[63] The defendants asserted that in any event, even if the statutory exception in s 75(2)(c) do not apply, the plaintiff had waived his preemption rights by virtue of the shareholders' agreement with reliance placed upon cl 3 therein.

[64] Given its importance, cl 3 of the shareholders' agreement ('cl 3') is reproduced hereunder:

> Based on the agreement of the original 3 shareholders (D1 to D3) to allow the admittance of new shareholders and as part of the preconditions irrevocably agreed and imposed upon the 5 new shareholders (plaintiff and D5 to D8) before their admittance into the company (Clause 2); it is decided that the Board of Directors shall be allowed to maintain their previous authority and full discretion to issue new shares and/or grant rights to subscribe to new shares exclusively and directly to anyone outside/within the current shareholders board at a value to be determine(d) by the directors, for the purpose of recruitment, remuneration, investors and/or to employees/directors/third parties as performance reward/compensation/incentive. *Existing shareholders shall waive their rights to the first offer of shares to be issued to maintain this pre-existing agreement. However any such proposal must be presented to the Shareholders before allotting.*

[65] It is clear from cl 3, that the shareholders of the company had been informed that they have a pre-emptive right over new shares in the company and by entering into the shareholders' agreement, they were waiving the same and on this basis they had joined the company.

[66] The plaintiff cannot now blow hot and cold by contending that the allotment of the Shares to D1 breached his pre-emptive rights under s 85 of the CA 2016 and the reg 41 when he had waived such rights under the shareholders' agreement in the first place.

[67] With all the shareholders of the company having waived their preemptive rights under s 85 and reg 41, the new shares which were allotted to D1 did not need to be first offered to the existing shareholders including the plaintiff.

[68] Instead, what was required, if the statutory exception conferred by s 75(2)(c) of the CA 2016 do not apply, was that the proposal for the issue of the new shares must be presented to the shareholders for approval before allotting and this was in fact done.

There was no unfairness to the plaintiff

[69] The defendants, save for the nominal defendant (D9) in their collective affidavits explained why they wanted to reward D1 the new shares The following factual averments put forth were not challenged by the plaintiff:

(a) D1 is the founder of the company;

(b) under D1, the company's business had more than doubled. From 2018 to 2019, the revenue of the company grew from RM292,196 to RM1.062m whilst net profit grew from RM20,657 to RM262,368. In 2020, the company managed to post a profit of RM164,750 whilst generating a revenue of RM1.064m despite its business being severely curtailed by the restrictions under the various Movement Control Orders ('MCO') imposed to curb the COVID-19 pandemic;

(c) given the tight cash flow of the company during the MCO, D1 personally paid the remuneration of the company's employees in March 2020 to ensure that the company does not lose any staff and is able to continue as a going concern once business operations is allowed to resume;

(d) D1 provided personal bank guarantees for various bank loans to fund the company's working capital requirements; and

(e) D1 stopped taking his salary since January 2021 to lower the company's operating costs especially during the MCO and to ensure that the company has enough working capital to pay its employees.

[70] It was pointed out that the plaintiff did not object to the proposal to reward or compensate D1 for D1's contributions but only disagreed with the method to do so and the plaintiff had in fact suggested that it be in the form of dividends or bonus cash payments which were not feasible because:

(a) D1 was not a shareholder of the company as all his shares were transferred to D4 and hence no dividends could be issued to him; and

(b) a bonus payment would significantly hamper the company's cash flow at a time when its business was recovering given the relaxation of the restrictions under the MCO.

[71] The allotment would see a proportionate dilution across the board for all the other shareholders, save for D1, and was done transparently with the plaintiff continuing to remain a minority shareholder both before and after the allotment of the new shares. See *Seah Eng Toh Daniel & Anor v Kingsley Khoo Hoi Leng & 3 Ors* [2015] MLJU 2353; [2016] 2 CLJ 695 (HC) which held that there was no oppression where a transparent issue of shares to one shareholder affected all other shareholders particularly where the complainant

was a minority shareholder both before and after the allotment.

[72] Given that the plaintiff was the only shareholder who was discontented with the approval of the allotment of the new shares, a proposal was made at the Extraordinary General Meeting held in October 2021 for further shares to be allotted to the plaintiff so that his shares will not be diluted but he failed to respond.

[73] In the circumstances, there was no commercial unfairness ie a visible departure from the standards of fair play as set out in *Re Kong Thai Sawmill,* and the plaintiff certainly has not made out a case of oppression under s 346 of the CA 2016.

COURT'S ANALYSIS AND FINDINGS

[74] *Pleading point*

(a) contrary to the plaintiff's assertion that the defendants ('D1 to D8') in opposing his claim had not pleaded that there is 'direction to the contrary', the defendants ('D1 to D8') in fact have done so;

(b) see paras 15, 32, 43 and 49(i) of D1's affidavit affirmed for himself as well as for D2 and D3 (encl 5) wherein in summary it was deposed that D1 to D3 were the founders of the company, and that under the shareholders agreement, recognition is given to the founders, that authority is given to the directors of the company to allot shares to anyone at a price to be determined by the Board for various purposes, including as remuneration and performance rewards. This was provided that the proposal to allot shares shall be presented to the shareholders for approval *and the shareholders expressly waived any rights to be first offered any new shares being issued in the company and or any pre-emptive rights they have to such new shares* And, at an annual general meeting on 23 May 2021 there was a proposal which was approved for the new shares to be allotted to D1 at a price of RM0.01 per share with an Extraordinary General Meeting held on 21 October 2021 where the allotment of the new shares to D1 was approved by the shareholders of the company with a vote of 85% to 15% with all the shareholders voting in favour save for the plaintiff;

(c) see paras 9, 15, 21, 25, 26 (c) of D8's affidavit affirmed for himself as well as for D4 to D7 (encl 6) wherein in summary it was deposed that they acknowledged D1 as the owner and promoter of the company holding the largest shareholding, and that they agree that under the shareholders agreement they have agreed to waive or give up any

pre-emptive rights to new shares and they acknowledge and agree that there can be allotment of shares to D1 resulting in their shareholding being diluted; and

(d) in his affidavits in reply ('encls 7 and 8') to the D1 to D3's Affidavit ('encl 5') and D4 to D8's affidavit ('encl 6') the plaintiff took issue with the D1 to D8's averments aforesaid, which show that he knew exactly the nature of their challenge and cannot be said to have been taken by surprise by D1 to D8's challenges against the applicability of s 85 of the CA 2016 and reg 41.

[75] In my considered view, the averments contained in the exchange of affidavits are sufficient for the defendants to mount the legal challenge on a point of law whether the provisions of s 85 of the CA 2016 and reg 41 apply in the circumstances of this case.

[76] Wherefore, I find the pleading point asserted by the plaintiff to be devoid of merit.

Promoter — No question of pre-emption rights

[77] A careful study of *Concrete Parade* shows that on the facts that obtained therein, the allotment of shares was *not to a promoter and by reason thereto the statutory exceptions housed within* sub-s 75(2)(c) of the CA 2016 *was not considered at all.* This is abundantly clear upon a reading of Her Ladyship's, Lau Bee Lan JCA judgment at paras [28] and [29] which are reproduced hereunder for ease of reading:

> [28] The respondents also argue there is allegedly no breach of s 85 of CA 2016 as s 75 of the CA 2016 grants directors the power of allotment in respect of the placement shares s 75 of the CA 2016 (material part) provides:
>
> Exercise of power of directors to allot shares or grant rights
>
> (1) Unless the prior approval by way of resolution by the company has been obtained, the directors of a company shall not exercise any power:
>
> (a) to allot shares in the company;
>
> ...
>
> (d) to allot shares under an agreement or option or offer.
>
> (2) Subsection (1) shall not apply to:
>
> (a) an allotment of shares, or grant of shares, under an offer made to the members of the company in proportion to the members' shareholdings;
>
> [29] It is our respectful view that the respondents' contention is untenable in light of the reasons proffered by the appellant that the general power of allotment

under s 75 of the CA 2016 cannot be used by the respondents to bypass the safeguards under s 85 of the CA 2016. Firstly, s 85 of the CA 2016 is not subjected to s 75 of the CA 2016 as the former is only subjected to the constitution, which makes no reference to the latter. Secondly, the express wording of s 75 states that the directors 'shall not exercise any power to allot shares in the company' unless the prior approval by way of resolution by the company has been obtained. thirdly, the directors of Apex Equity have always accepted that prior approval is required because in previous annual general meetings, shareholder approval was always sought to empower the directors to allot and issue new shares up to an amount not exceeding 10% of Apex's issued share capital (AGM minutes of 28 May 2018, item resolution 11).

[78] It is abundantly clear that the Court of Appeal in *Concrete Parade* was not called upon to decide on the applicability of the statutory exception housed within s 75(2)(c) of the CA 2016 pertaining to an allotment of new shares to a promoter.

[79] In the circumstances, the plaintiff's reliance upon *Concrete Parade* despite the clear distinguishing circumstances is, with respect, wholly misguided.

[80] In his submissions in reply, the plaintiff posed the rhetorical question that had it been Parliament's intention that s 85 is subject to sub-s 75(2)(c), why is there an absence of such wording?

[81] The answer is that applying the harmonious rule of construction, these two sections ought to be construed so as to complement each other and are to be applied depending on the circumstances of each case, failing which the statutory exception conferred by sub-s 75(2)(c) would be denuded of any efficacy, and this would offend the rule that statutory language cannot be treated as mere surplusage. See *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; [1985] CLJ Rep 122 where the Supreme Court said:

... every word in a statute must be given meaning and effect. Statutory language cannot be treated as mere surplusage or a dead letter.

Waiver of the requirements of s 85 of the CA 2016 and reg 41

[82] In *Concrete Parade*, it was accepted that there could be a waiver of the pre-emption right under the company's articles which were similar to *reg 41 of Company's Articles* as well as s 85 of the CA 2016, provided that the waiving party knew their right and chose not to exercise the same. See paras [20] and [24] of the judgment which is reproduced:

[20] We are of the considered view that the appellant has a statutory and contractual pre-emptive right to be offered new shares in Apex Equity premised on a reading of:

(i) s 85(1) of the CA 2016... with

(ii) article 11 of the M&A *which states:*

> Subject to any direction to the contrary that may be given by the company in general meeting, all new shares or other convertible securities shall be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled ...

[24] In any event we agree with the submission of the appellant that-on the facts of the appeal before us, the placement resolution cannot constitute a 'direction to the contrary' for the following reasons:

(b) for a 'direction to the contrary' to be operative, the proposed resolution must set out all the requisite information regarding the shareholders' pre-emptive rights under s 85(1) of the CA 2016 ie:

(i) the existing shareholders had a statutory pre-emptive right to be offered any new shares which rank equally to existing shares issued by Apex Equity read together with article 11 of the M&A;

(ii) *by voting in favour of the resolution for the issuance of the placement shares, the shareholders of Apex Equity would be waiving their statutory pre-emptive right;* and

(iii) *the placement resolution cannot be relied upon to suggest a waiver of express statutory rights because a waiver by election is only valid if the party electing had knowledge of his legal rights and with that knowledge consciously chose not to exercise the same ...*

[83] This court accepts that by reason of the plaintiff's agreement on terms contained particularly in cl 3 of the shareholders' agreement, he had expressly agreed that the Board of Directors of the company shall be allowed to issue new shares at a value to be determined by the Board of Directors for the purposes of recruitment, remuneration, investors and/or to employees/directors/third parties as performance reward/compensation/incentive, and that he shall waive his rights to the first offer of shares

[84] What was required, however, was that any such proposal must be presented to the shareholders before allotting. In this case, the proposal for the allotment of the new shares was in fact presented at the annual general meeting held on 23 May 2021 and again at the Extraordinary General Meeting held on 21 October 2021 and on both occasions the proposal was approved with a vote of 85% for and 15% against.

[85] On whether a person can enter into a contract to waive a benefit conferred upon him by statute, in *Danaharta Hartanah Sdn Bhd v KSL Reality Sdn Bhd & Benua Kurnia Sdn Bhd & Neraca Prisma Sdn Bhd (Pencelah)* [2008]

MLJU 460 the Court of Appeal held:

> *As a general rule, any person can enter into a binding contract to waive benefits conferred on him by an Act of Parliament or, as it is said, can contract himself out of the Act, unless it can be shown that it would be contrary to public policy to allow such an agreement (see 9(1) Halsbury's Laws of England, 4th Ed, Reissue 1998, para 868). There can be no waiver of compliance with statutory provisions enacted in public interest, nor can there be any estoppel against setting up non-compliance with them, even when the provisions relate to the form of contracts between individuals and public bodies created by or under a statute [Ns Bindra's Interpretation Of Statutes, 9th Ed p 363].*
>
> In *Kimlin Housing Development Sdn Bhd v Bank Bumiputra,* Edgar Joseph Jr FCJ delivering the judgment of the court said at p 820:
>
> The question whether a person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound and the latter can effectively contract out of performing the duty, depends on the language of the particular statute and, if this is not clear, on the overall purpose of the statute and whether this purpose would be defeated by permitting waiver and contracting out. *Trietel on Contract* (at p 782) has correctly pointed out:
>
> > Difficult questions can arise where a person attempts by contract to waive a right conferred on him by statute. Although there is a general principle that a person may waive any right conferred on him by statute (qualibet potest renunciare juri pro se introducto), difficulties arise in determining whether the right is exclusively personal or is designed to serve other more broad public purposes In the latter situation, public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates Whether a statutory right is waivable depends on the overall purpose of the statute and whether this purpose would be frustrated by permitting waiver.

[86] In *Danaharta Hartanah*, the Court of Appeal held the defendants could not waive the operation of s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Danaharta Act') by contracting out of it because this Act was designed to serve public interest *to promote the revitalisation of the nation's economy,* and to hold otherwise would be frustrating the clear intention of the legislature and defeat the public interest.

[87] In the instant case, save for asserting that his agreement to waive his pre-emptive rights is contrary to s 85 of the CA 2016 and reg 41, the plaintiff has not shown that it would be contrary to public policy to allow such an agreement.

[88] Instead, in my view, the shareholders' agreement merely seek to regulate the private interests of shareholders in a private company limited by shares which was incorporated and operated with the view to seeking profits on a commercial basis for themselves, the shareholders.

[89] Thus, the general rule elucidated in *Danaharta Hartanah* that any person can enter into a binding contract to waive benefits conferred on him by an Act of Parliament would apply in the circumstances of this case.

[90] Wherefore, I accept the collective submissions of the defendants (D1 to D8) that the plaintiff by entering into the shareholders' agreement, and in particular agreeing to the provisions of cl 3 thereof, had waived his rights to be first offered the allotment of the new shares and this agreement is valid and enforceable.

[91] In other words, the parties to the shareholders' agreement can and in fact have waived, the operation of s 85 of the CA 2016 and *reg 41.*

Whether there was oppression

[92] The court is conscious that the plaintiff has grounded his claim on s 346 of the CA 2016 which provides an avenue for a minority shareholder to seek reliefs from the court when the affairs of the company or the exercise of powers by the company's directors are being carried out in a manner which is oppressive, unfair, prejudicial and/or in disregard to the shareholders' interests

[93] On the concept of fairness, in *O'Neill and another v Phillips and others, Re a company (No 00709 of 1992)* [1999] 2 BCLC 1 at p 7, the UK House of Lords held that:

> Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.
>
> In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association *and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed …* (Emphasis added.)

[94] The shareholders' agreement in this case would amount to a collateral agreement between the shareholders on the manner in which the affairs of the company may be conducted, and it can hardly be said to be unfair if the plaintiff were to be held to the bargain he had contracted for.

[95] From the unchallenged averments on the contributions of D1, that the dilution of shareholding was across the board for all the other shareholders, and

with a proposal having been made to the plaintiff to maintain his percentage of shareholding despite the allotment of new shares but which he declined, it is my considered view that in allotting the new shares to D1, there was no commercial unfairness or oppression practised upon the plaintiff.

D9 not a party to the shareholders' agreement

[96] As for the plaintiff's assertion that the company's articles take precedence over the shareholders' agreement since the company was not a party to it and the terms never incorporated into the articles, with reliance placed upon the authority of *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd* [1999] 3 MLJ 262, a decision of Kang Hwee Gee J (then) I find that this is also without merit for the following reasons:

(a) the issue here is not privity or the incorporation of agreed terms by the shareholders into the articles. Rather, the issue is whether the plaintiff had waived his pre-emption rights because the company can issue shares under s 75 of the CA 2016, and even though shareholders have a pre-emptive right over such shares under s 85 and reg 41, the shareholders can choose to either exercise, decline to exercise or waive their pre-emptive rights;

(b) the plaintiff had expressly waived his pre-emptive right for reasons already set out above and I have found that in the circumstances of this case, his waiver does not offend any public policy;

(c) the shareholders' agreement is a collateral agreement on how the affairs of the company is to be governed and the making of such collateral agreements have been accepted under company law jurisprudence to be permissible so long as it is not against public policy;

(d) as pointed out by learned counsel for the plaintiff, in *Liew Teck Fook v Chan Yip Pooi* [2005] 5 CLJ 20 Kang Hwee Gee J (then) the same judge who decided *Beh Chun Chuan* said that the latter case is not an authority for saying that a shareholders' agreement may not be relied upon to seek equitable intervention by the court, see also *ISM Sdn Bhd v Queensway Nominees (Asing) Sdn Bhd & Ors and other suits* [2021] 7 MLJ 506 at para [130] ; and

(e) by reason of the *Duomatic* principle which is elaborated below.

[97] This court also accepts the defendants' submissions that in any event, the terms of the shareholders' agreement amounted to a resolution of the company based on the *Duomatic* principle.

[98] The *Duomatic* principle provides that unanimous director/shareholder assents on a matter are binding on the company with such assent being deemed

as having been passed in a resolution of the company. This applies regardless of whether the matter unanimously assented to was subjected to formalities in the company's articles or in statute as such formalities can be dispensed with.

See:

(a) *Jimat bin Awang & Ors v Lai Wee Ngen* [1995] 3 SLR 769 (Singapore CA) pp 503–504 where it was held that:

> 22. Generally, a company exercises any of its powers by means of resolutions in general meetings It is also a well-entrenched common law principle that the unanimous and informal assent by all the members of a company in some other manner is as effective as a resolution passed at a general meeting, even if the assent is given at different times: see *Parker and Cooper v Reading* [1926] Ch 975, and even if otherwise a special or extraordinary resolution is required: see *Cane v Jones* [1981] All ER 533...

(b) *Ng Joo Soon (alias Nga Ju Soon) v Dovechem Holdings Pte Ltd and another suit* [2011] 1 SLR 1155 (Singapore HC) pp 1171–1172;

> [45] Under the *Duomatic* principle, expounded in *Re Duomatic Ltd* [1969] 2 Ch 365, the courts have regarded informal unanimous director or shareholder assents to be binding on the company provided it was intra vires *In Re Duomatic*, the court upheld the payment of salaries to directors challenged by the liquidator as not having been approved in general meeting in the light of the fact that all the shareholders having the right to attend and vote at a general meeting had assented to this payment which a general meeting could approve. This assent, given by all the directors, who were also the shareholders of the company, was held to be binding as a resolution in general meeting. The *Duomatic* principle has been applied in Singapore in *Jimat bin Awang v Lai Wee Ngen* [1995] 3 SLR(R) 496 *and SAL Industrial Leasing Ltd v Lin Hwee Guan* [1998] 3 SLR(R) 31.
>
> [47] The manner of characterisation of the consent does not matter. In *EIC Services Ltd v Phipps* [2003] BCC 931 (reversed by the Court of Appeal on other grounds (see *EIC Services Ltd v Phipps* [2005] 1 WLR 1377)) Neuberger J stated at para [122] that:
>
> > The essence of the *Duomatic* principle is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make in inequitable for them to deny that they have given their approval. *Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification, waiver, or estoppels, and whether the members of the group give their consent in different ways at different times, does not matter.'*
>
> [48] With respect to statutory prescriptions, in *Monecor (London) Limited v Euro Brokers Holdings Limited* [2003] 1 BCLC 506 Mummery LJ *at para [62] held that the Duomatic principle allows members of a company:*

> *To reach an agreement without the need for strict compliance with formal procedures, where they exist only for the benefit of those who have agreed not [to] comply with them. It does not matter whether the formal procedures in question are stipulated for in the articles of association, in the Companies Act or in a separate contract between the members of the company concerned. What matters is that all the members have reached an agreement. If they have, they cannot be heard to say that they are not bound by it because the formal procedure was not followed.*

[99] In the instant case, the shareholders' agreement was freely entered and executed by all the directors of the company (D1, D2 and D3) as well as the entire body of the shareholders of the company at that time namely all the parties in this action including the plaintiff save for D4 and D9.

[100] Applying the *Duomatic* principle in my view, the terms in the shareholders' agreement are binding on the company and is deemed to have been passed in a resolution of the company.

Court will not rewrite a contract

[101] From the exchange of affidavits, the court observes that the relationship amongst the shareholders has deteriorated not least with the plaintiff's two attempts to be appointed to the board of directors being unsuccessful (encl 5 para 34 and encl 6 para 30(d)) leading to his discontent (encl 6 paras 26(b) and 30(e)).

[102] The court is of the considered opinion that the parties to the shareholders' agreement (encl 5 exh D10) which was exhed by D1 and not the plaintiff, ought to be held to the bargain they have made.

[103] There is a plethora of authorities that it is [not] for the court to rewrite any contract the parties have made and the Federal Court has in *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021] 3 MLJ 549 said it is not for the court to assist a party from what he may feel is turning out to be a bad bargain. See also *Mega Education Systems Sdn Bhd & Anor v Ozone Glass Design Sdn Bhd & Ors* [2011] 6 MLJ 644 (HC) where the HC held that 'the court cannot be expected to provide an exit mechanism for them when the investment turns sour' and I would add when relations among the shareholders turn sour'.

CONCLUSION

[104] In the upshot, the court dismissed the plaintiff's action with costs of RM25,000 to D1 to D3 and RM15,000 to D4 to D8 with both set of costs to

A be subject to allocatur and to be paid by the plaintiff to each set of defendants through their respective sets of solicitors.

Claim dismissed.

B Reported by Ahmad Ismail

C

D

E

F

G

H

I